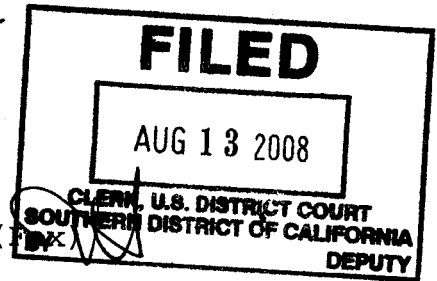


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on 8/22/2008*

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 United States of America

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	Criminal Case No. 08CR0416LAB
Plaintiff,)	
v.)	Declaration of Assistant United
)	States Attorney Caleb E. Mason
FRANCISCO ESPARZA-GUTIERREZ,)	
Defendant.)	
)	Date: August 18, 2008
)	Time: 3 p.m.
)	Honorable: Larry A. Burns
)	Courtroom:

I, Caleb E. Mason, hereby declare and state that:

1. I am an Assistant United States Attorney for the Southern District of California. I was assigned this case on appeal. I did not handle the original sentencing.
2. Defense counsel David Peterson called me prior to filing his Opening Brief to ask whether I would object to an expedited schedule. He explained that his client's overriding interest was in getting the case remanded quickly. I agreed to the expedited schedule.

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1 3. After reviewing the file, I determined that the U.S. Attorney's
2 Office did not have the necessary I-205 Warrant of Removal to
3 substantiate the allegation of deportation after a previous felony
4 conviction.

5 4. I further concluded that the sentence of a 9-month term of
6 imprisonment followed by 5 years' probation was illegal under United
7 States v. Forbes.

8 5. After discussing the issues with my supervisors, I called
9 Peterson and proposed that we reach a settlement. In that
10 conversation Peterson asked me why I did not want to argue the case.
11 I replied that I had an obligation to do justice, and I couldn't
12 defend the sentence imposed under Forbes.

13 6. I then proposed that we reach an agreement under Rule 42 of the
14 Federal Rules of Appellate Procedure.

15 7. Under that rule, the parties would put their agreement in
16 writing and submit it to the Ninth Circuit for acceptance.

17 8. I told Peterson that the United States would concede error on
18 the sentencing issue and the enhancement issue, but would litigate
19 the breach issue on the grounds that the government's underlying
20 recommendation of 60 days' custody had remained unchanged.

21 9. I told Peterson that the United States would not oppose remand
22 for resentencing, and would not oppose immediate issuance of the
23 mandate.

24 10. I told Peterson that under Paragraph 8 of the plea agreement,
25 the United States has the right to set aside a guilty plea and
26 withdraw from the agreement in the event that the defendant's
27 criminal history is found to be different from what the parties
28

1 believed when they entered into the agreement. In this case, the
2 agreement specified Category I but Defendant is in Category III;
3 therefore, the United States would have the right to withdraw.

4 11. I told Peterson that while the computer records indicated a
5 deportation in January 2008 as alleged in the government's first
6 amended sentencing summary chart, we did not have the original
7 I-205, as the Assistant United States Attorney at the original
8 sentencing had accurately informed this Court. I told Peterson that
9 if the United States received the I-205 establishing the deportation
10 prior to any resentencing, I would move to set aside the plea and
11 withdraw from the agreement, because the agreement would then be in
12 conflict with my ethical obligation of candor to the tribunal.

13 12. I proposed three possible alternative settlements: First,
14 resentencing under the original agreement. I explained to Peterson
15 that until the U.S. Attorney's Office received the I-205, we would
16 be unable to offer proof of the deportation and therefore could not
17 recommend the plus-four upward adjustment. Second, a plea to False
18 Statement under § 1001. Third, a plea to illegal entry under §
19 1325.

20 13. Peterson rejected my proposal categorically, stating that he
21 would not enter into any Rule 42 Agreement.

22 14. I then prepared my brief for filing in the Ninth Circuit.

23 15. Peterson then called me and informed me that in a previous case
24 handled by another attorney in his office, the government had filed
25 a Motion for Summary Reversal under Rule 27, and that he would not
26 oppose such a motion if the government would agree to withdraw from
27 the plea on remand.
28

1 16. I discussed this option with my supervisors, and they agreed
2 that it would be an appropriate resolution.

3 17. Peterson then sent me a letter containing an example of a
4 government Motion for Summary Reversal. The letter is the one
5 reproduced as Defendant's Exhibit F. That letter accurately
6 summarized my understanding of the parties' respective intentions.

7 18. I then drafted a Motion for Summary Reversal. The legal
8 arguments made in the Declaration attached to the Motion were
9 identical to the arguments made in the brief I had already prepared.

10 19. When the Motion was granted, Peterson called me, and I asked
11 him what he wanted to do on remand. Peterson told me he wanted
12 me to send him a 1325 plea agreement because that was what we had
13 agreed on. I told him I did not remember such an agreement and
14 asked him where it was memorialized. He responded: "It's all in
15 writing. It's in the letter." He then read me the letter
16 reproduced in his Motion as Exhibit F. I responded that that letter
17 does not mention a 1325 plea agreement, and that I was still
18 prepared to withdraw from the original agreement under Paragraph 8.
19 He then conceded that the letter did not mention a 1325 plea
20 agreement, but insisted that we had an oral agreement and stated that
21 he would seek specific performance of that oral agreement.

22 20. After speaking to Peterson, I carefully reviewed the file and
23 my recollections of our earlier conversations. I then wrote
24 Peterson an email stating that I did not recall entering into the
25 agreement he was alleging.

26 21. Throughout my conversations with Peterson, he consistently told
27 me that his client wanted a quick remand.
28

1 22. As of this date, August 12, 2008, I am in possession of a faxed
2 copy of the I-205 Warrant of Removal for Defendant's January 21,
3 2008 deportation. It is attached as an exhibit to the Supplemental
4 Brief filed in this case on August 7, 2008. I am not in possession
5 of the original document.

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7 I so declare this 12th day of August, 2008.

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10 Caleb E. Mason, Declarant
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